

1997

Stephen D. Oliverson and Ruth H. Oliverson v. Lester Romero : Brief of Appellant

Utah Court of Appeals

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**UTAH COURT OF APPEALS
BRIEF**

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DOCKET NO. 970572

IN THE UTAH COURT OF APPEALS

**STEPHEN D. OLIVERSON and
RUTH H. OLIVERSON**

Plaintiffs-Appellees,

v.

LESTER ROMERO,

Defendant-Appellant

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Case No. 970572

Priority No. 15

BRIEF OF DEFENDANT-APPELLANT

**APPEAL FROM A DECISION OF THE
FOURTH DISTRICT COURT, UTAH COUNTY, STATE OF UTAH
HONORABLE ANTHONY W. SCHOFIELD**

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FILED

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COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

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RUTH H. OLIVERSON

Plaintiffs-Appellees,

v.

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JURISDICTION OF THE COURT

The jurisdiction of this Court is based upon § 78-2-2(3)(j), and § 78-2-2(4) Utah Code Ann. (1953 as amended).

STATEMENT OF THE ISSUES

1. Whether the trial court committed reversible error by entering the Order and Judgment granting Plaintiffs' and Third Party Defendant's Motions for Summary Judgment when disputed questions of material fact were clearly presented by affidavit and exhibit.

Standard of Review: This Court reviews the trial court's decision on summary judgment as a question of law for correctness. Webb V. Ninow, 883 P.2d 1365 (Utah App. 1994).

STATEMENT OF THE CASE

A. Nature of the case.

This action was brought by Appellees ("Oliveros") to quiet title to certain real property located in Utah County, Utah. (the "Property"). In response, Appellant ("Romero") counterclaimed to foreclose on the Property.

B. Course of Proceedings

On or about December 9, 1994, the Oliveros filed a Complaint (the "Complaint") against Romero seeking to quiet title to the Property and recover damages for slander of title. On or about January 31, 1995, Romero Commenced a judicial foreclosure action on the Trust Deed by filing a Counterclaim, and Third Party Complaint. On or about August 15, 1996, Oliveros and

Third Party Defendant Bob Huish ("Huish") moved for Summary Judgment against Romero. On or about October 15, 1996, Romero filed a Memorandum in Opposition to the Motion for Summary Judgment.

C. Disposition of the Trial Court

The matter came before the Trial Court for hearing on March 18, 1997. The Trial Court granted Oliversons' and Huish's Motions for Summary Judgment on the grounds set forth in the Oliversons' Motion for Summary judgment dated August 15, 1996, and Memorandum filed in support thereof, also dated August 15, 1996.¹ Huish filed a separate Motion and Supporting Memorandum for Summary Judgment which adopted and relied upon the grounds set forth in the Oliversons' Motion and Supporting Memorandum for Summary Judgment.²

D. Statement of Facts

The following undisputed and disputed facts are material to the consideration of questions presented in this appeal:

Undisputed Facts:

1. The real property (the "Property") which is the subject of this action is located in Utah County, Utah. The Property is more particularly described as follows:

COMMENCING 4.90 ¼ chains South of the Northwest corner of the Southwest ¼ of Section 19, Township 4 South, Range 2 East, Salt Lake Base and Meridian and running thence 39 min. West 187.5 feet; thence South 5 deg. 21

¹ Record, page 379, ¶ 1-2 (Order and Judgment).

² Record, page 323-327 (Third Party Defendant Motion and Memorandum in Support of Summary Judgment).

min. West 95.4 feet; thence North 86.5 deg. East 30 feet to the Point of Beginning.³

2. In 1986, Romero and Huish entered a transaction, whereby Romero loaned Six Thousand Dollars (\$6,000.00) to Huish. (the "Obligation").⁴

3. The Obligation was secured by a Trust Deed dated July 2, 1986.⁵

4. On or about July 3, 1986, the Trust Deed was recorded against the Property in the office of the Utah County Recorder, in which Huish, who then owned the Property, was the named Trustor and Romero the named Beneficiary.⁶

5. On or about October 29, 1986, Stephen and Ruth Oliverson (the "Oliversons") acquired the Property from Huish.⁷

6. The Trust Deed has not been reconveyed and remains as a lien on the Property.⁸

³ Record, page 378, ¶ 5 (Order and Judgment).

⁴ Record, page 364-362 (Defendant's Affidavit in Opposition to Plaintiff's Motion for Summary Judgment).

⁵ Id; see also Record, page 194, ¶ 2 (Memorandum in Support of Plaintiff's Motion for Summary Judgment).

⁶ Record, page 194, ¶ 2 (Memorandum in Support of Plaintiff's Motion for Summary Judgment).

⁷ Record, page 193 ¶ 7 (Memorandum in Support of Plaintiff's Motion for Summary Judgment).

⁸ Record, page 193, ¶ 9 (Memorandum in Support of Plaintiff's Motion for Summary Judgment).

7. On or about December 9, 1994, the Oliversons filed a Complaint (the "Complaint") against Romero seeking to quiet title to the Property and recover damages for slander of title.⁹

8. On or about January 31, 1995, Romero Commenced a judicial foreclosure action on the Trust Deed by filing a Counterclaim, and Third Party Complaint.¹⁰

Disputed Facts:

9. On or about April 23, 1986, Huish executed and delivered to Romero a Promissory Note (the "April 23rd Note") in the sum of Six Thousand Dollars (\$6,000.00), together with interest to which was secured by the Trust Deed.¹¹

10. On or about July 2, 1986, and to secure payment of the April 23rd Note, Huish executed and delivered to Stewart Title of Utah, as trustee, for the benefit of Romero, the Trust Deed.¹²

11. Romero received the following payments from Huish as partial satisfaction of the amount owing under the Obligation and

⁹ Record, pages 18-01 (Plaintiff's Complaint).

¹⁰ Record, page 48-34 (Defendant's Answer, Counterclaim and Third Party Complaint).

¹¹ Record, pages 364-63 (Defendant's Affidavit in Support of Memorandum in Opposition to Plaintiff's Motion for Summary Judgment); Record, page 48-34 (Defendant's Answer, Counterclaim and Third Party Complaint).

¹² Id. Record page 194, paragraph 2 (Plaintiff's Memorandum in Support of Motion for Summary Judgment).

Trust Deed: \$100.00, August 7, 1986; \$100.00, November 15, 1987; \$50.00, May 27, 1989; and \$100.00, December 7, 1992.¹³

12. Despite diligent efforts, Romero was unable to locate Huish in order to arrange further payment and satisfaction of the Obligation.¹⁴

13. Huish failed, neglected and refused, despite repeated demands by and on behalf of Romero, to pay the Obligation evidenced and secured by the April 23rd Note and Trust Deed.¹⁵

14. Huish's failure to pay the amount due under the April 23rd Note and Trust Deed constituted an event of default.¹⁶

15. Because of Huish's default, Romero elected to declare the entire remaining unpaid balance owing under the April 23rd Note secured by the Trust Deed immediately due and payable.¹⁷

**DETERMINATIVE CONSTITUTIONAL PROVISIONS,
STATUTES, ORDINANCES AND RULES**

§ 78-12-1 Utah Code Ann. Time for commencement of actions generally.

Civil actions may be commenced only within the periods prescribed in this chapter, after the cause of action has

¹³ Record, page 366, ¶ 5 (Defendant's Affidavit in Support of Memorandum in Opposition to Plaintiff's Motion for Summary Judgement).

¹⁴ Id., at ¶¶ 6-7.

¹⁵ Id.

¹⁶ Id.; Record pages 48-34 (Defendant's Answer and Counterclaim).

¹⁷ Record pages 48-34 (Defendant's Answer and Counterclaim).

accrued, except in specific cases where a different limitation is prescribed by statute.

§ 78-12-23 Utah Code Ann. Within six years - Mesne profits of real property - Instrument in writing - Distributing of criminal proceeds to victim.

An action may be brought within six years:

- (1) For the mesne profits of real property.
- (2) Upon any contract, obligation, or liability founded upon an instrument in writing, except those mentioned in Section 78-12-22.

§ 78-12-35 Utah Code Ann. Effect of absence from state.

Were a cause of action accrues against a person when he is out of the state, the Action may be commenced within the term as limited by this chapter after his return to the state. If after a cause of action accrues he departs from the state, the time of his absence is not part of the time limited for the commencement of the action.

§ 78-12-44 Utah Code Ann. Effect of payment, acknowledgment, or promise to pay.

In any case founded on contract, when any part of the principal or interest shall have been paid, or an acknowledgment of an existing liability, debt or claim, or any promise to pay the same, shall have been made, an action may be brought within the period prescribed for the same after such payment, acknowledgment or promise; but such acknowledgment or promise must be in writing, signed by the party to be charged thereby.

When a right of action is barred by the provisions of any statute, it shall be unavailable either as a cause of action or ground of defense.

SUMMARY OF ARGUMENT

Mr. Romero appeals the decision of the trial court on the basis that there were genuine issues of material fact raised by Romero and presented to the trial court which precluded the entry of summary judgment in favor of the Appellees. In the present case, it is undisputed that a legitimate obligation was created in favor of Romero and secured by the Trust Deed which currently encumbers the Property owned by the Oliver sons. However, the Parties are in serious disagreement as to whether the Trust Deed remains valid and enforceable.

To resolve such disputes, the Oliver sons and Huish moved for summary judgment. By way of affidavit and exhibits, the Parties presented competent and conflicting evidence to the trial court. The issues raised and facts presented by the Parties focused on disputes as to the actual obligation secured by the Trust Deed as well whether such obligation was in fact satisfied prior to the running of the applicable statute of limitations. Such conflicting evidence and factual disputes are central to resolution of this matter, and at a minimum, should have been presented to the trier of fact, rather than resolved as a matter of law.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT WHEN THERE EXISTED QUESTIONS OF MATERIAL FACT

This Court has consistently held that on appeal from summary judgment, the reviewing Court will "review the facts in the light most favorable to the losing party, while giving no deference to the trial court's legal conclusions". ProMark Group, Inc. v. Harris Corp., 860 P.2d 964, 966 (Utah App. 1993); accord Projects Unlimited, Inc. v. Copper State Thrift & Loan Co., 798 P.2d 738, 743 (Utah 1990). Furthermore, "any doubts concerning questions of fact, including evidence and reasonable inferences drawn from the evidence should be resolved in favor of the party opposing the motion for summary judgment." Beehive Brick Co. v. Robinson Brick Co., 780 P.2d 827 (Utah Ct. App. 1989). In addition, because of the drastic and harsh nature of summary judgment, "the court should be reluctant to deprive the parties of the opportunity to fully present their contentions at trial." Welchman v. Wood, 337 P.2d 410, 411 (1959). Therefore, if the reviewing court concludes that a genuine issue of material fact exists, the trial court's determination must be reversed and remanded for further proceedings. Beehive Brick, 780 P.2d at 831.

The determination of whether to award summary judgment is governed by Rule 56 of the Utah Rules of Civil Procedure. The rationale of the Rule is revealed by its language:

... judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits,

if any, show that there is **no genuine issue as to any material fact** and that the moving party is entitled to judgment as a matter of law.

UTAH R.Civ.P. 56(c). (*emphasis added*).

Rule 56 of the Utah Rules of Civil Procedure further provides that the affidavits filed in connection with a summary judgment motion, "shall be made on personal knowledge, shall set forth facts as would be admissible in evidence and shall show affirmatively that the affiant is competent to testify to the matter stated therein." **UTAH R.Civ.P. 56(e)**.

It should be stressed that "it only takes one sworn statement to dispute averments on the other side of the controversy and create issues of material fact, thereby precluding summary judgment." Holbrook Co. v. Adams, 542 P.2d 191 (Utah 1975). The sworn affidavit of Romero filed in opposition to the Motion for Summary Judgment sets forth several admissible facts which conclusively demonstrate the presence of material and disputed issues of fact.¹⁸ As a result, summary judgment was clearly improper, where, as in this case, critical and material issues of disputed facts are present. Bill Brown Realty, Inc. v. Abbott, 562 P.2d 238 (Utah 1977).

**A. THE EXISTENCE OF A GENUINE MATERIAL
ISSUE OF FACT AS TO WHICH PROMISSORY NOTE WAS
SECURED BY THE TRUST DEED PRECLUDES SUMMARY JUDGMENT**

In the present case, the Oliverson's arguments for summary judgment are riddled with disputed issues of material fact and

¹⁸ Record, pages 371-359 (Defendant's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment).

statements. In fact, the very nature of the Parties' competing claims, i.e., whether the obligation was satisfied, raise several issues of material fact precluding the entry of summary judgment.

First of all, there is a material dispute as to which promissory note is actually secured by the Trust Deed. The Oliverson's position is that the Trust Deed is "security for a July 2, 1986 promissory note".¹⁹ On the other hand, Romero claims that the Trust Deed actually "secures a promissory note dated April 23, 1986."²⁰ The determination of which promissory note is actually secured by Trust Deed is critical to establishing the Parties' respective rights and obligations under the Trust Deed. Therefore, "the presence of such a disputed material fact precludes summary judgment". Brown Realty, 562 P.2d at 238-39.

**B. THE EXISTENCE OF A GENUINE
MATERIAL ISSUE OF FACT AS TO WHETHER
THE OBLIGATION SECURED BY THE TRUST DEED
WAS IN FACT SATISFIED PRECLUDES SUMMARY JUDGMENT**

In addition to the material factual dispute as to which promissory note is actually secured by the Trust Deed, the Parties are also in disagreement as to whether the underlying obligation, ("Obligation") which is evidenced by either the April 23, 1986 note or the July 2, 1986 note and secured by the Trust Deed has been fully satisfied. In their Motion for Summary

¹⁹ Record, pages 197-171 (Plaintiff's Memorandum in Support of Plaintiff's Motion for Summary Judgment).

²⁰ Record, pages 371-359 (Defendant's Memorandum in Opposition to Plaintiff's Motion for Summary Judgement).

Judgment, the Oliversons assert that because the July 2, 1986 note "states that it is payable in full 'upon closing of the sale of' the Property",²¹ and because the "closing of the sale" occurred on or before October 29, 1986, as evidenced by the recording of the Warranty Deed conveying title from Huish to them,²² that by implication the Obligation was in fact satisfied. On the other hand, Romero alleges that not only is the Trust Deed secured by the April 23, 1986 note, rather than the July 2, 1986 note, but, as set forth below, he has not received full payment or satisfaction of the Obligation.²³ Such a dispute is not only critical to resolution of the case, it is also a question of fact and as a result, should be resolved by the trier of fact.

**C. THE EXISTENCE OF A
GENUINE MATERIAL ISSUE OF FACT
AS TO WHETHER THE STATUTE OF LIMITATIONS
WAS TOLLED PRECLUDES SUMMARY JUDGMENT**

In their Motion for Summary Judgment, the Oliversons take the position that Romero is barred by the statute of limitations from enforcement of, or collection on the obligation secured by the Trust Deed.²⁴ In support of that position, the Oliversons

²¹ Record, page 193, ¶ 6 (Plaintiff's Memorandum in Support of Plaintiff's Motion for Summary Judgment).

²² Record, page 193, ¶ 7 (Plaintiff's Memorandum in Support of Plaintiff's Motion for Summary Judgment).

²³ Record, pages 364-362 (Defendant's Affidavit in Support of Memorandum in Opposition to Plaintiff's Motion for Summary Judgment).

²⁴ Record, pages 191-189 (Plaintiff's Memorandum in Support of Plaintiff's Motion for Summary Judgment).

assert that Romero's right to foreclose or otherwise enforce the Obligation, is time barred by §78-12-23(2) Utah Code Anno., which provides for a six (6) year statute of limitations for any actions "upon any contract, obligation, or liability founded upon an instrument in writing". Id. Specifically, the Oliversons allege that the "closing" of the sale on or about October 29, 1986 triggered the running of the six year statute of limitations under §78-12-23(2) upon which to foreclose the Property.²⁵ As a result, because Romero did not bring the foreclosure action until on or after January 31, 1995, over eight (8) after the "closing", he was time-barred from foreclosing on or enforcing the Trust Deed and underlying obligation".²⁶

However, under § 78-12-44, Utah Code Ann., if Romero received payments of any part of the principle or interest due under the obligation, then the statute of limitations runs anew from the date of receipt of the latest payment. Section 78-12-44, reads as follows:

In any case founded on contract, when any part of the principal or interest shall have been paid, or an acknowledgement of an existing liability, debt or claim, or any promise to pay the same, shall have been made, **an action may be brought within the period prescribed for the same after such payment.**

Utah Code Ann. § 78-12-44. (*emphasis added*). Such tolling has long been recognized by the Utah Courts. Holloway v. Wetzel, 45 P.2d 565 (Utah 1935).

²⁵ Id.

²⁶ Id.

In the present case, there is a sworn affidavit by Romero that he did in fact, receive a series of payments up until December 7, 1992 as partial satisfaction of the Obligation secured by the Trust Deed.²⁷ Specifically, Romero states in his sworn affidavit, that he received the following payments on the underlying Obligation: \$100.00, August 7, 1986; \$100.00, November 15, 1987; \$50.00, May 27, 1989; and \$100.00, December 7, 1992. Romero, therefore, argued to the trial Court that as a result of the subsequent payments and acknowledgments of the underlying obligation, the six-year statute of limitations contained in § 78-12-23(2) Utah Code Ann., was actually tolled by § 78-12-44, Utah Code Ann.

Therefore, under the facts presented by Romero to the trial Court, at the earliest, the cause of action to foreclose on or otherwise enforce the Trust Deed accrued at the time of the last evidence of payment, or on approximately December 7, 1992.²⁸ Consequently, and pursuant to §78-12-23 and §78-12-44, Utah Code Ann., as well as established Utah case law, Romero had six (6) years, or until December 7, 1998, within which to commence the action to foreclose on or otherwise enforce the Trust Deed. At the latest, Romero commenced this action at the time of the filing of the answer and counterclaim, or January 31, 1995,

²⁷ Record, page 363-359, ¶¶ 5-6 (Defendant's Affidavit in Support of Memorandum in Opposition to Plaintiff's Motion for Summary Judgement).

²⁸ Id.

almost three years prior to the running of the applicable statute of limitations.²⁹

In addition to the disputed facts concerning subsequent payment and acknowledgement of the debt, the six-year statute of limitation was also tolled by Huish's absence from the State of Utah pursuant to § 78-12-35 Utah Code Ann., which provides in relevant part that:

Where a cause of action accrues against a person when he is out of the state, the action may be commenced within the term as limited by this chapter after his return to the state.

Utah Code Ann. § 78-12-44 (1991). Therefore, because there are disputed facts concerning Huish's absence from the State of Utah, which if ultimately proven, would also toll the six-year statute of limitations contained in §78-12-23(2) Utah Code Ann., and allow Romero to properly foreclose or otherwise enforce the Trust Deed. In addition, in certain circumstances where the statute of limitations would bar a parties' claim, proof of concealment or misleading by the other party may preclude the other party from asserting the statute of limitations as a defense. See e.g., Myers v. McDonald, 635 P.2d 84, 86 (Utah 1981); Vincent v. Salt Lake County, 583 P.2d 105 (Utah 1978); Rice v. Granite School District, 23 Utah 2d 22, 456 P.2d 159 (1969).

In this case, Romero, by and through sworn affidavit, presented admissible facts, which if found to be true would toll the applicable statute of limitations upon which to bring an

²⁹ Record, pages 48-34 (Defendant's Answer and Counterclaim).

action on the Trust Deed and underlying Obligation.

Specifically, Romero stated in his affidavit, that he had "spent considerable time and effort in attempting to locate Huish to arrange further payments", and that he "was informed by Huish's landlords, as well as by the Oliversons, that Huish had left the State of Utah.³⁰ Such facts as well as the reasonable inferences to be drawn from them, i.e., that Huish was concealing his whereabouts to avoid dealing with the obligation to Romero, thereby tolling the statute of limitations.

Because Romero presented admissible facts in a sworn affidavit, which, if proven, would toll the six-year statute of limitations contained in §78-12-23(2) Utah Code Ann., and allow him to properly foreclose on or otherwise enforce the enforce the Trust Deed and underlying Obligation pursuant to § 78-12-44, Utah Code Ann., such facts should be presented to the trier of fact, rather than resolved as a matter of law.

POINT II

Plaintiffs Were Not Entitled to Summary Judgment as a Matter of Law.

Assuming arguendo, the non-existence of any material issue of fact, summary judgment is nevertheless proper only where the moving party has made a "showing which precludes, as a matter of law, the awarding of any other relief to the losing party."

Tanner v. Utah Poultry and Farmers Cooperative, 359 P.2d 18, 19

³⁰ Record, page 363, ¶ 7 (Defendant's Affidavit in Support of Memorandum in Opposition to Plaintiff's Motion for Summary Judgement).

(Utah 1961). The Oliversons must "clearly" show that "there is no reasonable probability that the party moved against could prevail." Frisbee v. K & K construction Company, 676 P.2d 387, 389 (Utah 1984).

Plaintiffs have failed to satisfy the above standard. The existence in this case of an agreement between Romero and Huish and an obligation arising thereunder as evidenced by the Trust Deed is undisputed.³¹ These facts, along with Romero's sworn affidavit that such Obligation remains unsatisfied, when viewed in the light most favorable to Romero, creates a reasonable probability that Romero may prevail on his claim to enforce the Obligation secured by the Trust Deed. At a minimum, such facts establish a question for the trier of fact. Summary judgement, therefore, was improper.

CONCLUSION

Based on the foregoing substantial and persuasive reasons, Appellant Romero respectfully submits this Brief for the Court's consideration and determination, and requests that the judgment of the lower court be reversed and the matter remanded for trial.

DATED this 17th day of December, 1997.

APPEL & WARLAUMONT, L.C.

By 

James R. Wilson
Attorney for Appellant

³¹ Record, page 194, ¶ 2 (Plaintiff's Memorandum in Support of Plaintiff's Motion for Summary Judgement).

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of December, 1997, I caused a copy of the foregoing BRIEF OF DEFENDANT-APPELLANT to be hand-delivered to:

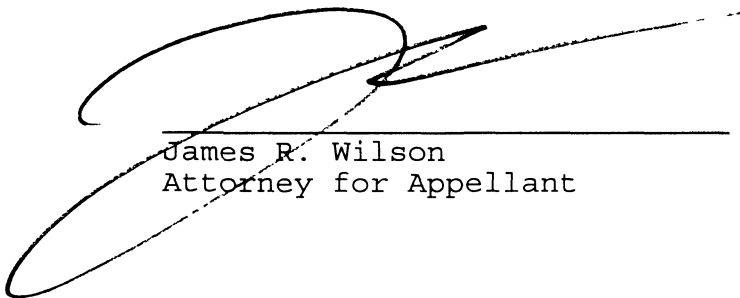
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ADDENDUM "A"

A3

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IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY
STATE OF UTAH

STEPHEN D. OLIVERSON and RUTH H. OLIVERSON, Plaintiffs, vs. LESTER ROMERO and J. SCOTT LUNDBERG, Defendants.	ORDER AND JUDGMENT Civil No. 940400709 Judge Anthony W. Schofield
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This matter came before the Court for hearing on March 18, 1997, at 1:15 p.m., pursuant to Rule 4-504, Utah Code of Judicial Administration, on Plaintiffs' Motion for Summary Judgment, dated August 15, 1996, and on Third Party Defendant Bob K. Huish's ("Huish") Motion for Summary Judgment, dated October 2, 1996. Robert J. Dale appeared for Plaintiffs. James R. Wilson appeared for Defendant Lester Romero ("Romero"). Kirk G. Gibbs appeared for Third-Party Defendant Bob Huish. The Court having reviewed the motions, all applicable memoranda and other pleadings

on file herein, having heard oral argument, and having ruled from the bench, for good cause shown,

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED as follows:

1. Plaintiffs' Motion for Summary Judgment is granted. The grounds for the Court granting Plaintiffs' Motion for Summary Judgment are the grounds set forth in Plaintiffs' Motion for Summary Judgment, dated August 15, 1996, and Plaintiffs' "Memorandum in Support of Plaintiffs' Motion for Summary Judgment," dated August 15, 1996.

2. Third Party Defendant Huish's Motion for Summary Judgment is granted. The grounds for the Court granting Huish's Motion for Summary Judgment are the grounds set forth in "Third-Party Defendant Huish's Reply Memorandum in Support of Motion for Summary Judgment," dated October 2, 1996, in Plaintiffs' Motion for Summary Judgment, dated August 15, 1996, and in Plaintiffs' "Memorandum in Support of Plaintiffs' Motion for Summary Judgment," dated May 2, 1996.

3. There is no just reason for delay and the Court directs that a summary judgment as hereinafter set forth be entered in favor of Plaintiffs and Huish, as provided in Rule 54(b), Utah Rules of Civil Procedure, and pursuant to Plaintiffs' and Huish's respective Motions for Summary Judgment.

4. Defendant Romero's Counterclaim and Third Party Complaint on file herein, and any and all other claims in this action of Romero against Plaintiffs and/or Huish, are hereby dismissed with prejudice and on the merits as against Plaintiffs and Huish.

5. All of Plaintiffs' rights, titles, and interests in and to the following described real property located in Utah County, Utah (the "Property"), are quieted as against Defendants and as against any and all persons and entities claiming by, through, and/or under Defendants or either of them (hereafter, collectively, "Defendants"), and as against all claims of Defendants to any right, title, trust deed, lien, encumbrance, and/or other interest of any kind claimed by Defendants or any of them in, to, or on the following described property (the "Property"):

COMMENCING 4.90 1/2 chains South of the Northwest corner of the Southwest 1/4 of Section 19, Township 4 South, Range 2 East, Salt Lake Base & Meridian and running thence East 165 feet; thence North 69 feet; thence North 82° 39' West 187.5 feet; thence South 5° 21' West 95.4 feet; thence North 86.5 East 30 feet to the Point of Beginning.

6. Specifically, and without limitation of any kind upon the foregoing, Plaintiffs' rights, titles, and interests in and to the Property are hereby quieted as against that certain Trust Deed recorded on and against the Property wherein Defendant

Romero was and is named as the beneficiary, which Trust Deed was dated July 2, 1986, and was recorded on July 3, 1986, in the office of the Utah County Recorder, as Entry No. 21182, in Book 2318, at Page 683 (the "Romero Trust Deed").

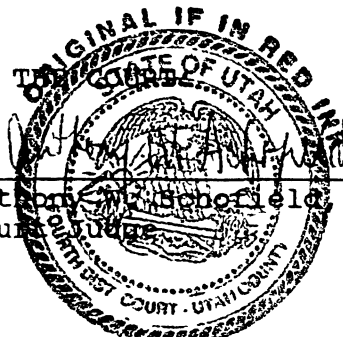
7. The Romero Trust deed is hereby declared to be null and void and of no force or effect whatsoever, including without limitation as a trust deed, lien, or encumbrance of any kind on or covering the Property.

8. The following document recorded in the office of the Utah County Recorder, pertaining to the Romero Trust Deed, is also hereby declared to be null and void and of no force or effect whatsoever: Notice of Default and Election to Sell, dated May 12, 1994, executed by J. Scott Lundberg, and recorded May 19, 1994, as Entry No. 41890, in Book 3447, at Page 290.

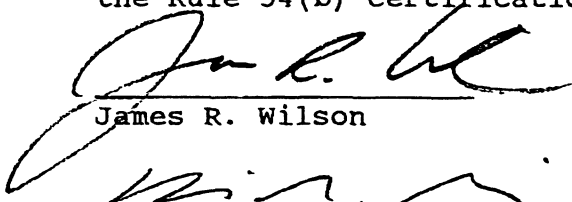
9. Defendants are hereby permanently enjoined and restrained from continuing or commencing any foreclosure of the Romero Trust Deed and from any other efforts to enforce the Romero Trust Deed against the Property.

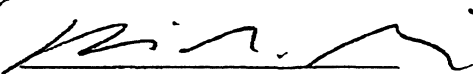
DATED this 24th day of April, 1997.

BY Anthony M. Schofield
Anthony M. Schofield, District
Court Judge



This Order and Judgment
are Approved as to form
(including without
limitation the inclusion of
the Rule 54(b) certification):


James R. Wilson


Kirk G. Gibbs

CERTIFICATE OF MAILING


I HEREBY CERTIFY that a true and correct copy of the foregoing
ORDER AND SUMMARY JUDGMENT was mailed, first class mail, postage
prepaid, this 14th day of April, 1997, to:

James R. Wilson
9 Exchange Place
1100 Boston Building
Salt Lake City, Utah 84111

Kirk G. Gibbs
10 Exchange Place
Fourth Floor
Salt Lake City, Utah 84111

Gordon Duval
110 South Main Street
Pleasant Grove, Utah 84062

J. Scott Lundberg
P.O. Box 1290
Salt Lake City, Utah 84110-1290


Robert J. Dale